TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 192.

GEORGE F. ORCHARD, PLAINTIFF IN ERROR,

vs.

WILLIAM ALEXANDER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

FILED JUNE 9, 1891.

(14,677.)

PHILADELPHIA
LAW ASSOCIATION

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INDEX.

	Original.	Print.
Transcript from superior court	*a*	1
Complaint	1	1
Answer	3	2
Amended reply	6	4
Demurrer to amended reply	9	6
Order sustaining demurrer	10	6
Judgment	11	7
Order of appeal	13	7
Assignment of errors	14	8
Clerk's certificate	15	8
Motion to remove to United States court	16	9
Stipulation as to hearing, &c	19	10
Order denying motion to remove	20	11
Order taking cause under advisement	20	11
Judgment	21	11
Opinion and dissent	22	12
Petition for rehearing	23	12

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 14, 1894.

	Original.	Print.
Order denying petition for rehearing	39	20
Cost bill	40	20
Petition for writ of error	41	21
Order allowing writ of error, &c.	47	23
Assignment of errors	51	25
Writ of error	56	27
Certificate of Federal question	57	28
Citation	58	28
Bond	59	29
Clerk's certificate	61	30

[Seal of the Supreme Court, State of Washington]

a In the Superior Court of the State of Washington for the County of Pierce.

GEORGE F. ORCHARD, Plaintiff,
vs.
WILLIAM ALEXANDER, Defendant.

1 In the Second Judicial District Court of Washington Territory in and for Pierce County.

GEORGE F. ORCHARD
vs.
WILLIAM ALEXANDER.

Now comes the above-named plaintiff, George F. Orchard, and complains of the defendant, William Alexander, and for cause of action alleges:

I.

That all the times hereinafter mentioned plaintiff was the owner and was in the possession and was entitled to the possession of all that certain tract or parcel of real estate situate, lying, and being in Pierce county, Washington Territory, and described as follows, viz: Lots Nos. 3 and 4 of section 2, township 20 north, range 2 east, containing 101.71 acres.

II.

That while plaintiff was so seized and in possession of said lands the defendant, on the — day of February, 1883, and without — or title, entered into the possession of the demanded premises and ousted and ejected plaintiff therefrom, and now unlawfully withholds the possession thereof from plaintiff, to his damage in the sum of one thousand dollars.

III.

That the value of the rents and profits of said premises from the said — day of February, 1883, and while the plaintiff has been excluded therefrom by the defendant is one thousand dollars.

Wherefore this plaintiff prays judgment against the defendant:

2 1. For the recovery of the possession of the demanded premises, and for the sum of one thousand dollars damages for withholding the possession thereof.

2. For the sum of one thousand dollars, the value of the said rents, issues, and profits, and costs of suit.

STILES & STEVENS,
Att'ys for Plaintiff.

TERRITORY OF WASHINGTON, }
County of Pierce. }

George F. Orchard, having been first duly sworn, on oath says that he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and he believes the same to be true.

G. F. ORCHARD.

Subscribed and sworn to before me this 17th day of Sept., 1889.

[SEAL.] C. E. CLAYPOOL,
Notary Public, Pierce County, Washington.

Complaint. No. 2995.
Filed Sept. 18th, 1889.

A. REEVES AYERS, *Clerk.*

3 In the District Court of the Second Judicial District of Washington Territory, Holding Terms at Tacoma.

GEORGE F. ORCHARD, Plaintiff, }
vs.
WILLIAM ALEXANDER, Defendant. }

Comes now the defendant, William Alexander, and for answer to plaintiff's complaint he alleges as follows, to wit:

I.

He denies each and every allegation contained in plaintiff's said complaint.

And for further answer and by way of equitable defense the defendant alleges:

I.

That prior to the 17th day of August, 1881, the land described in plaintiff's complaint was public land of the United States, unoccupied and unappropriated, and that on said day plaintiff filed thereon under the pre-emption laws of the United States and made cash entry for the same March 4th, 1884.

II.

That on the 9th day of July, 1883, and prior to plaintiff so making cash entry, this defendant filed upon said lands under the homestead laws of the United States, and that on the 4th day of April, 1884, defendant filed affidavits with the register and receiver, as required by the rules of practice of the General Land Office, against the allowance of plaintiff's said cash entry upon the ground
4 that plaintiff had failed to reside on said land and failed to cultivate and improve the same, as required by law.

III.

That on the 12th day of May, 1884, the Commissioner of the General Land Office ordered a hearing before the register and receiver at Olympia, on the affidavits and charges so made by this defendant.

IV.

That in pursuance of said order so made as aforesaid the register and receiver notified plaintiff and defendant to appear at Olympia, with their respective witnesses, on the 15th day of July, 1884, and that on said day plaintiff and defendant both appeared in person and by counsel; that witnesses were examined for plaintiff and defendant touching the charges so made in said affidavits, and that after all the evidence was submitted by this plaintiff and defendant written briefs and arguments were filed by plaintiff's and defendant's counsel, and that thereafter, on the 15th day of November, 1884, the register and receiver duly rendered their decision, finding as the facts from all the evidence that plaintiff herein did not establish his residence on said land; that he failed to cultivate and improve the same and held his cash entry for cancellation.

V.

From the decision so made by the register and receiver the plaintiff herein took an appeal to the Commissioner of the General Land Office, and that the said Commissioner, on the 17th day of November, 1885, after duly examining all the evidence submitted by both parties herein, duly affirmed the decision of the register and receiver and further found that plaintiff's proof was fraudulently made.

5 VI.

That thereafter and within the time allowed by law the plaintiff took an appeal from the said decision of the Commissioner of the General Land Office to the Secretary of the Interior, and that on the 30th day of November, 1887, the Secretary of the Interior affirmed the decision of the Commissioner of the General Land Office, and on the 13th day of December following the said cash entry so made by plaintiff for the land described in the complaint was duly cancelled by the said Secretary of the Interior, and it was further ordered that the homestead entry of defendant herein, covering the land described in plaintiff's complaint, should remain and stand intact.

VII.

That on the 21st day of June, 1889, defendant herein made final proof upon his said homestead entry, covering and embracing all the land described in plaintiff's complaint, paid all fees required by law, and received final homestead receipt No. 2821, entitling this

defendant to a patent from the Government of the United States for all and singular the premises described in plaintiff's complaint.

JUDSON, SHARPSTEIN & SULLIVAN,
Attorneys for Defendant.

TERRITORY OF WASHINGTON, } ss:
County of Pierce, }

William Alexander, being duly sworn, on oath says that he is the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that he believes it to be true.

[SEAL.] WILLIAM ALEXANDER.

Subscribed and sworn to before me this 28th day of September, A. D. 1889.

E. W. TAYLOR,
Notary Public.

Filed Sept. 28, 1889.

A. REEVES AYERS, *Clerk.*

6 In the District Court of the Second Judicial District of Washington Territory, Holding Terms at Tacoma in and for Pierce County.

GEORGE F. ORCHARD, Plaintiff,
vs.
WILLIAM ALEXANDER, Defendant. } Amended Reply.

Now comes the plaintiff in the above-entitled cause and, by leave of the court first obtained herein, files his amended reply to the answer of the defendant as follows:

I.

He says that the said alleged filing of an affidavit by the defendant in the office of the Commissioner of the General Land Office was without authority of law and was void, and the said alleged proceedings had and *had* taken thereon by the said Commissioner and the register and receiver and the Secretary of the Interior were each and all wholly void for the reason that neither of said officers had any jurisdiction whatever over the said land or of this plaintiff; and he further says that the said alleged cancellation of plaintiff's entry of said land, and the said alleged filing under the homestead laws thereon by the defendant, and his said alleged final proof thereon, and the said alleged issuance to the defendant of a receiver's receipt or patent certificate by the receiver of the United States Land Office for the said land were each and all void acts and gave to the defendant no right, title to, or interest in said land or
7 any part thereof, for the reason that the United States long theretofore had sold and disposed of said land to this plaintiff and had received from plaintiff the sum of four hundred dollars

($400.00), in consideration of which sum the said United States had undertaken and agreed with this plaintiff to execute and deliver to plaintiff a patent for said land; all of which was well known to the defendant at all the times mentioned in said answer.

II.

And plaintiff further says that prior to March 4th, 1884, in accordance with the pre-emption laws of the United States and the regulations of the General Land Office, he caused a notice of his intention to make final proof on said date to be published for thirty days in a newspaper, and on said date he appeared with his witnesses before the register and receiver at Olympia and made his final proof and paid to said register and receiver the proper land office fees and the sum of four hundred dollars ($400.00), which was the legal price of said land; and thereafter, on or about the — day of March, 1884, the said register and receiver accepted said final proof as sufficient and received said sum of four hundred dollars ($400.00), and executed and delivered to this plaintiff the duplicate receiver's receipt therefor, and thereupon plaintiff became entitled to have and receive from the United States, in the due course of the administration of the General Land Office,
8 a patent for said land, and no lawful proceedings have ever been taken by the United States to rescind the contract so entered into between the United States and this plaintiff for the conveyance of said land by the execution and delivery of said patent, nor has the sum of four hundred dollars ($400.00) or any part thereof been paid or tendered to the plaintiff by the United States, and plaintiff, as an entryman of said land as aforesaid, was the owner thereof and was in the possession and was entitled to be in the possession of the same at the date of defendant's said entry and at all other times since the said — day of March, 1884.

III.

He denies that the said Alexander in his said alleged affidavit alleged that this plaintiff failed to improve and cultivate said land as required by law, or that the said entry of plaintiff had been procured by fraud.

IV.

He denies that the said decision of the Commissioner of the General Land Office was affirmed by the Secretary of the Interior, except as to the finding of the register and receiver and Commissioner that plaintiff had not made his residence upon said land, and further denies that said register or receiver or Commissioner or Secretary ever found that plaintiff's said proof was fraudulently made or that any such issue was ever raised before any of said officers.

STILES & STEVENS,
Att'ys for Plaintiff.

TERRITORY OF WASHINGTON, }
County of Pierce, } *ss:*

George F. Orchard, having been first duly sworn, on oath says that he is the plaintiff in the above-entitled action; that he has read the foregoing amended reply and knows the contents thereof, and he believes the same to be true.

GEO. F. ORCHARD.

Subscribed and sworn to before me this — day of Nov., 1889.
[SEAL.]
R. J. DAVIS,
Notary Public, Pierce County, Washington.

Filed Nov. 27, 1889.
W. H. FLETCHER, *Clerk.*

9 In the Superior Court of the State of Washington in and for the County of Pierce, Late in the District Court of the Second Judicial District of Washington Territory, Holding Terms at Tacoma in and for Pierce County.

GEORGE F. ORCHARD, Plaintiff, }
vs.
WILLIAM ALEXANDER, Defendant. }

The defendant in the above-entitled action demurs to the amended reply of the plaintiff herein and assigns as grounds of demurrer that said amended reply does not contain facts sufficient to constitute the defense to the affirmative matter set up in defendant's answer.

JUDSON, SHARPSTEIN & SULLIVAN,
Attorneys for Defendant.

No. 2995.
Filed Nov. 29, 1889.

10 In the Superior Court of the State of Washington in and for the County of Pierce.

GEORGE F. ORCHARD, Plaintiff, }
vs.
WILLIAM ALEXANDER, Defendant. }

This cause came on to be heard on the second day of December, 1889, and upon the demurrer of the defendant to the new matter contained in the amended reply of plaintiff. Both parties were represented by their respective counsel, and, after argument, the cause was submitted to the court for decision; and now, on the 11th day of December, 1889, the court, having duly considered the law and the premises, does order that the said demurrer be sustained; to which ruling of the court plaintiff, by his counsel, duly excepts; which

exception is allowed, and plaintiff is granted ten days from this date within which to file and serve herein a further amended reply.

No. 2995.
Filed Dec. 12th, 1889.

W. H. FLETCHER, *Clerk.*

11 In the Superior Court of the State of Washington in and for the County of Pierce.

GEORGE F. ORCHARD, Plaintiff,
vs.
WILLIAM ALEXANDER, Defendant.

This cause having been heretofore heard upon the demurrer of defendant to the new matter contained in the amended reply of plaintiff, and the court having on the eleventh day of December, 1889, sustained said demurrer, to which ruling the plaintiff did then and there except, and the court having then and there granted plaintiff ten days' time within which to serve and file a further amended reply to said answer, and said time having expired, and now, on this 29th day of January, 1890, both parties being present in court by their counsel, the defendant, by his counsel, Messrs. Judson, Sharpstein & Sullivan, moves the court that the default of the plaintiff be entered and for judgment against said plaintiff for a dismissal of said action and for the costs and disbursements of the action; and thereupon the said plaintiff, by his attorneys, Messrs. Doolittle, Pritchard & Stevens, announce that they do not desire to plead further in said action, but elect to stand upon the pleadings as heretofore filed herein; whereupon, all matters being by the court now here seen, heard, and considered and fully understood—

It is ordered, adjudged, and considered that this action be
12 dismissed, and that defendant do have and recover of plaintiff herein his costs and disbursements herein, taxed at $—, and that execution do issue therefor; to which order and judgment the plaintiff at the time excepted and his exceptions are allowed.

FRANK ALLYN, *J.*

Filed Jan. 29, 1890.

W. H. FLETCHER, *Clerk.*

Page 123, J. 9.

13 In the Superior Court in and for the State of Washington, Holding Terms in the County of Pierce, Heretofore Known as the District Court in and for the Second Judicial District of the Territory of Washington, Holding Terms at Tacoma in and for the County of Pierce.

GEORGE F. ORCHARD, Plaintiff,
vs.
WILLIAM ALEXANDER, Defendant.

Now, on this day, come the parties in the above-entitled cause, and thereupon the plaintiff above named gave notice in open court

that he appeals to the supreme court of the State of Washington from the final judgment herein, made and entered in favor of the said defendant and against the said plaintiff on the 29th day of January, 1890, for the dismissal of the said action and for the sum of $23.80 *dollars* costs, and that the said appeal is taken from the whole and every part of said judgment.

It is therefore ordered by the court that the said notice of appeal be, and the same is hereby, entered of record in this court.

Done in open court this 18th day of February, 1890.

FRANK ALLYN, *Judge.*

Order of appeal.
Filed February 18th, 1890.

W. H. FLETCHER, *Clerk.*

14 In the Superior Court in and for the State of Washington, Holding Terms in the County of Pierce, Heretofore Known as the District Court in and for the Second Judicial District of the Territory of Washington, Holding Terms at Tacoma in and for the County of Pierce.

GEORGE F. ORCHARD, Plaintiff,
vs.
WILLIAM ALEXANDER, Defendant. } Assignment of Errors.

Now comes the plaintiff in the above-entitled cause and assigns the following errors upon which he relies on his appeal herein to the supreme court herein, viz:

First. That the said superior — erred in sustaining the demurrer of the defendant to the reply of the plaintiff herein.

Second. That the superior — erred in rendering judgment in favor of the defendant for dismissal of said action and for costs herein.

Third. That the judgment in the above-entitled cause ought to have been given in favor of the plaintiff, as prayed for in the complaint, and the court erred in rendering any judgment in favor of the defendant.

DOOLITTLE, PRITCHARD & STEVENS,
Attorneys for Appellant.

Filed Feb'y 20, 1890.

STATE OF WASHINGTON, } ss:
County of Pierce, }

I hereby acknowledge service of the within assignment of errors at Tacoma, county of Pierce, Washington, this 19th day of February, A. D. 1890.

JUDSON, SHARPSTEIN & SULLIVAN,
Attorneys for Defendant.

15 STATE OF WASHINGTON, } ss:
County of Pierce, }

I, W. H. Fletcher, clerk of the superior court of the State of Washington for the county of Pierce, do hereby certify that the

foregoing is a full, true, and correct transcript of so much of the record in the above-entitled cause as I am by statute required on appeal to transmit to the supreme court.

In testimony whereof I have hereunto set my hand and [SEAL.] the seal of said superior court this twelfth day of April, A. D. 1890.

W. H. FLETCHER, *Clerk.*

Filed May 26, 1890.
SOL. SMITH, *Clerk.*

16 In the Supreme Court of the State of Washington.

GEORGE F. ORCHARD, Plaintiff in Error, *vs.* WM. ALEXANDER, Defendant in Error. } Motion to Remove to United States Court.

Now comes the plaintiff, George F. Orchard, and shows to the court that the above-entitled action was commenced prior to the date of the admission into the Union of the State of Washington, and that at the time of such admission this above-entitled action was pending; that the said action arose within the limits of the said State of Washington, whereof the United States circuit court for the State of Washington has jurisdiction, and that the said action is one of which said circuit court of the United States might and would have had jurisdiction under the laws of the United States had such court existed at the time of the commencement of said action; that the matter in dispute in said above-entitled action and for which the same was brought exceeds in value the sum of two thousand dollars, exclusive of costs, and that the matter in dispute in such action arises under the laws of the United States, and the decision thereof depends wholly upon and must be decided entirely upon a construction of the statutes of the United States; and the said George F. Orchard now makes and files his written request in this court in pursuance of that act of the Congress of the United States generally known as the enabling act and entitled An act to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, and Washington to form constitutions and State governments and to be admitted into the Union on
17 equal footing with the original States, and to make donations of public lands to said States, approved February 22d, 1889, and, in pursuance of said act, now and hereby requests and moves this court to transfer and remove this case to the circuit court of the United States for the district of the State of Washington upon the grounds hereinbefore set forth, all of which are more fully shown by the records of this action.

GEORGE F. ORCHARD,
By DOOLITTLE, PRITCHARD & STEVENS,
His Attorneys.

STATE OF WASHINGTON, } ss:
County of Pierce, }

I, George F. Orchard, being duly sworn, depose and say—
That I am the plaintiff in the above-entitled action.
That I have read the foregoing written request for the removal of said action to the United States circuit court, and that the matters and things therein contained are true of my own knowledge.

G. F. ORCHARD, *Plaintiff.*

Subscribed and sworn to before me this 23rd day of May, 1890.

[SEAL.] WALTER LOVEDAY,
Notary Public, Residing at Tacoma, Wash.

18 STATE OF WASHINGTON, } ss:
County of Pierce, }

I hereby acknowledge due and legal service of the within motion at Tacoma, county of Pierce, Washington, this 23rd day of May, A. D. 1890.

JUDSON, SHARPSTEIN & SULLIVAN,
Attorneys for Def't in Error.

Filed May 26, 1890.
SOL. SMITH, *Clerk.*

19 In the Supreme Court of the State of Washington.

EBEN PIERCE } No. 64.
vs. }
JAMES A. FRACE. }

GEORGE F. ORCHARD } No. 65.
vs. }
WM. ALEXANDER. }

It is hereby agreed and stipulated that the motion to remove each of the above causes may be heard in the supreme court on Wednesday, May 28th, 1890, or as soon thereafter as counsel can be heard; and in the event that said motion should be overruled, then said *counsel* may immediately thereafter be heard upon its merits without further notice to either party.

JUDSON, SHARPSTEIN & SULLIVAN,
Att'ys for Def't in Error.
DOOLITTLE, PRITCHARD & STEVENS,
Att'ys for Plaintiffs in Error.

Filed May 27, 1890.
SOL. SMITH, *Clerk.*

20 GEORGE F. ORCHARD, Appellant,
vs.
WM. ALEXANDER, Appellee. } 65.

MAY 28, 1890.

And now, this cause coming on for hearing upon petition of appellant for removal of this cause to the United States district court, and after argument of counsel, and the court being fully advised in the premises and having fully considered the same, it is ordered that said petition be, and the same is, denied.

Entered, page 139, vol. I, of Record.

GEORGE F. ORCHARD, Appellant,
vs.
WILLIAM ALEXANDER, Appellee. } 65.

OCTOBER 24, 1890.

And now this cause, coming on for hearing upon the transcript of the record of the superior court of Pierce county, Messrs. Doolittle, Pritchard & Stevens appearing of counsel for appellant and Messrs. Judson, Sharpstein & Sullivan appearing of counsel for appellee, was duly argued and submitted by counsel and taken under advisement by the court.

Entered, page 177, vol. 1, Record.

21 In the Supreme Court of the State of Washington, January Session, A. D. 1891.

GEORGE F. ORCHARD, Appellant,
vs.
WILLIAM ALEXANDER, Appellee. } No. 65. Judgment.

This cause having been heretofore submitted to the court upon the transcript of the record of the superior court of Pierce county and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises, and having filed its opinion in writing, it is now, on this 11th day of February, A. D. 1891, on motion of Messrs. Judson, Sharpstein & Sullivan, of counsel for appellee, considered, adjudged, and decreed that the judgment of said superior court be, and the same is hereby, affirmed with costs, and that the said William Alexander have and recover of and from the said George F. Orchard the costs of this action, taxed and allowed at one hundred thirty-one & $\frac{55}{100}$ dollars, and that execution issue therefor; and it is further ordered that this cause be remitted to the said superior court for further proceeding in accordance with the opinion herein filed.

Entered, vol. I of Record, page 272.

22 GEORGE F. ORCHARD, Appellant, *vs.* WM. ALEXANDER, Appellee. } No. 65. Opinion. Filed February 11, 1891.

Appeal from the superior court of Pierce county.

Substantially the same questions have been argued in this case as in that of Peirce *vs.* Frace, just decided, and, for the reasons therein stated, the judgment of the lower court must be affirmed, and it will be so ordered.

JOHN P. HOYT, *J.*

We concur.

T. J. ANDERS, *C. J.*
ELMON SCOTT, *J.*

Filed Feb. 11, 1891.

SOL. SMITH, *Clerk.*

I dissent for the reasons assigned in the dissenting opinion of Pierce *vs.* Frace.

R. O. DUNBAR.

23 GEORGE F. ORCHARD, Plaintiff in Error, *vs.* WILLIAM ALEXANDER, Defendant in Error.

Petition for Rehearing.

Comes now the plaintiff in error, by Doolittle, Pritchard & Stevens, his attorneys, and moves the court to grant a rehearing in the above-entitled cause, and, in accordance with the rules of this court, presents the following argument in support of said motion, viz:

I.

In view of the great value of the property involved in the decision of this cause, and especially in view of the transcendent importance of the question which the court has been called upon to decide, we think no apology is necessary for presuming to ask for a rehearing and for presenting to the court a further argument in support of the contention of the plaintiff in error.

From the opinion of the court pronounced in this cause we are satisfied that more than usual attention has been given to the question involved, and that the court, so far as its time would admit, has carefully and patiently considered the authorities which have been cited by counsel upon both sides; but we think it is not unwarranted presumption to assume that counsel have had more time to give to the subject than the court could possibly devote to it, and
24 that we may be able, therefore, by some suggestions which we propose to offer, to persuade the court to grant the rehearing which we pray for.

After reading the opinion of the court as published we are satisfied of what we had no reason to doubt before the opinion was given, viz., that the reasons in support of the position for which we con-

tend are very strong and would appeal with peculiar force to the courts of this new western country, in which this question arises. Indeed, we think the court would feel impelled to excuse itself for going contrary to the tendency of this reasoning upon the sole ground that it feels impelled to do so by the apparent weight of authority which is brought to bear in opposition to that reasoning, in other words, that the supreme court of the State of Washington, if it should finally conclude to decide this case adverse to our contention, would be inclined to adopt the language used by the supreme court of the State of Minnesota in the case of Judd *vs.* Randall, 29 Northwestern Reporter, 589, which language is as follows: "If we were not constrained by the considerations to which we are about to allude, it is probable that our decision would be in accordance with that under review; but without setting forth the reasons which lead our minds toward that conclusion we will state briefly the ground of our decision to the contrary."

The decision under review in that case was in accordance with our contention in the case at bar, and the supreme court of the State of Michigan excuses itself for rendering a contrary decision by referring to prior cases in that State and to the case of Harkness *vs.* Underhill, 1st Black, 316.

25 II.

The supreme court of the State of Washington, in rendering its opinion in this cause, has decided only one question adversely to our contention, and in deciding that question has relied upon two cases from the Supreme Court of the United States, viz., the case of Barnard's Heirs *vs.* Ashley's Heirs, 18 Howard, 43, and Harkness *vs.* Underhill, 1st Black, 316. It is in reference to these two cases that we wish to make some suggestions.

(*a.*) Both cases seem to be reported with unusual laxity, and the meagre statement of the facts in these cases, we think, has caused the court to attach undue importance to them.

(*b.*) In the case of Barnard's Heirs *vs.* Ashley's Heirs a very close and rigid examination reveals certain facts which we are certain we can show to the court upon a rehearing.

(*c.*) It appears that Barnard's heirs were defeated in their claims by the judgment of the Supreme Court as well as by the judgment of the circuit court under review.

(*d.*) It appears that Barnard claimed nothing more than a pre-emption right, and it does not appear that his entry was ever allowed.

(*e.*) Barnard's heirs claimed only by virtue of an assignment of a right of pre-emption.

(*f.*) Barnard, instead of making proof to the satisfaction of the register and receiver, had merely attempted to make proof before these officers, and his proof had been rejected.

26 (*g.*) Barnard's heirs were simply asking the court to reverse the decision of the register and receiver in the very manner which, as we contend, is especially committed by statute to

them to determine judicially, and which, when determined by them, we contend, is conclusively settled.

(*h.*) On the other hand, Ashley's heirs claimed in substance that at the time when Barnard attempted to make entry of the lands in question their ancestor, Ashley, was the actual owner of the lands in controversy under adverse grants, which contention, if found to be true, as it was found by both courts, was sufficient to oust the register and receiver of any jurisdiction whatsoever.

III.

From these facts it will be seen that if the contention of Ashley's heirs was correct the finding of the register and receiver was wholly immaterial and irrelevant to the controversy, and if the contention of Branard's heirs was correct, then, according to our position in the case at bar, the decision of these officers upon the question involved was final and conclusive, and upon either of these assumptions the decision of the circuit and Supreme Courts could not have been otherwise. The same conclusion might also have been reached upon the ground of the invalidity of the assignment. See Myers *vs.* Croft, 13 Wallace, 291, where the difference between a pre-emption right and a pre-emption entry is clearly pointed out.

IV.

If the decision of the court had been in favor of Barnard's
27 heirs it would have been diametrically opposed to the doctrine that is established as well as any proposition can be by a uniform current of decisions by the Supreme Court of the United States—that is, it would have been contrary to the proposition that decisions of the Land Department upon matters of fact cognizable by it in the absence of fraud or imposition is conclusive everywhere else. See—

Lee *vs.* Johnson, 116 U. S., 48;
Johnson *vs.* Towsley, 13 Wallace, 72;
Warren *vs.* Brunt, 19 Wallace, 646;
Shepley *vs.* Collins, 91 U. S., 330;
Moore *vs.* Robbins, 96 U. S., 530;
Marquez *vs.* Frisbie, 101 U. S., 473,

and numerous other cases not necessary to cite here.

V.

We are confident that upon a rehearing we can satisfy the court that any language found in the opinion in the case of Barnard's Heirs *vs.* Ashley's Heirs which seems to militate against our contention in the case at bar is mere *obiter dicta*, and that this language, when viewed in the light of the facts in the case, is not at all antagonistic to our contention in the case at bar; and here we would suggest that if the rehearing be granted so that we can have time to do so we shall send to Washington, D. C., and obtain a full statement of the facts in the case.

We assent with greater confidence that this case of Branard's Heirs *vs.* Ashley's Heirs is not really hostile to our position
28 because of the fact that it has not been so regarded by Judge Deady, nor by the many other courts of the various States which we have cited in our brief and reply brief in this cause, but a careful examination of the case we are sure will show that our suggestions are well founded.

VI.

The other case relied upon, viz., that of Harkness *vs.* Underhill, is very clearly not hostile to our contention in the case at bar. In this case the entry which was set aside by the officers of the Land Department was not made under the pre-emption law of 1830, nor that of 1834, nor that of 1841, but was really a private sale or purchase, a pre-emptive right to which was claimed under the provisions of a special act of April 5, 1832. The provisions of that act gave to an "actual settler and housekeeper" a pre-emptive right to purchase land at private sale. The act did not provide in terms nor by implication for any means of ascertaining the fact of whether the applicant was an actual settler or housekeeper. There was no provision, either directly or indirectly, that this fact should be proved to the satisfaction of the register and receiver, the only provision upon the subject being a requirement that an affidavit should be filed at the time an application was made to purchase. Hence it is clear that this act did not constitute the register and receiver a special tribunal to determine this question of fact as the pre-emption law of 1830 and that of 1841 does in relation to the fact
29 of the residence and improvement therein provided for. Under this law of 1832 the duties of the register and receiver were simply ministerial and not judicial in any sense, and of course we concede that the ministerial acts of the register and receiver are subject to the direction of their superior officers, and the general supervisory power of the Commissioner of the General Land Office would be sufficient to authorize him to cancel such a sale or claimed entry as that which was before the court in the case of Harkness *vs.* Underhill. The question was really a question of the qualification of the party to make the purchase of the land in question.

The distinction which we here point out can only be made apparent by reference to the law of April 5, 1832, and a comparison of that act with the general pre-emption acts, and especially with the act of 1841, which is still in force.

VII.

While the language of the court in these two cases could not be adopted to its full extent in the opinion of the court in the case at bar, yet when read in the light of the facts we are confident that it does not in the least degree militate against the position which we assert in this case.

The language used by us in our original brief in stating the proposition for which we contend was not so fortunately selected as it

them to determine judicially, and which, when determined by them, we contend, is conclusively settled.

(*b.*) On the other hand, Ashley's heirs claimed in substance that at the time when Barnard attempted to make entry of the lands in question their ancestor, Ashley, was the actual owner of the lands in controversy under adverse grants, which contention, if found to be true, as it was found by both courts, was sufficient to oust the register and receiver of any jurisdiction whatsoever.

III.

From these facts it will be seen that if the contention of Ashley's heirs was correct the finding of the register and receiver was wholly immaterial and irrelevant to the controversy, and if the contention of Branard's heirs was correct, then, according to our position in the case at bar, the decision of these officers upon the question involved was final and conclusive, and upon either of these assumptions the decision of the circuit and Supreme Courts could not have been otherwise. The same conclusion might also have been reached upon the ground of the invalidity of the assi*h*nment. See Myers *vs.* Croft, 13 Wallace, 291, where the difference between a pre-emption right and a pre-emption entry is clearly pointed out.

IV.

If the decision of the court had been in favor of Barnard's
27 heirs it would have been diametrically opposed to the doctrine that is established as well as any proposition can be by a uniform current of decisions by the Supreme Court of the United States—that is, it would have been contrary to the proposition that decisions of the Land Department upon matters of fact cognizable by it in the absence of fraud or imposition is conclusive everywhere else. See—

Lee *vs.* Johnson, 116 U. S., 48;
Johnson *vs.* Towsley, 13 Wallace, 72;
Warren *vs.* Brunt, 19 Wallace, 646;
Shepley *vs.* Collins, 91 U. S., 330;
Moore *vs.* Robbins, 96 U. S., 530;
Marquez *vs.* Frisbie, 101 U. S., 473,

and numerous other cases not necessary to cite here.

V.

We are confident that upon a rehearing we can satisfy the court that any language found in the opinion in the case of Barnard's Heirs *vs.* Ashley's Heirs which seems to militate against our contention in the case at bar is mere *obiter dicta*, and that this language, when viewed in the light of the facts in the case, is not at all antagonistic to our contention in the case at bar; and here we would suggest that if the rehearing be granted so that we can have time to do so we shall send to Washington, D. C., and obtain a full statement of the facts in the case.

We assent with greater confidence that this case of Branard's Heirs *vs.* Ashley's Heirs is not really hostile to our position
28 because of the fact that it has not been so regarded by Judge Deady, nor by the many other courts of the various States which we have cited in our brief and reply brief in this cause, but a careful examination of the case we are sure will show that our suggestions are well founded.

VI.

The other case relied upon, viz., that of Harkness *vs.* Underhill, is very clearly not hostile to our contention in the case at bar. In this case the entry which was set aside by the officers of the Land Department was not made under the pre-emption law of 1830, nor that of 1834, nor that of 1841, but was really a private sale or purchase, a pre-emptive right to which was claimed under the provisions of a special act of April 5, 1832. The provisions of that act gave to an "actual settler and housekeeper" a pre-emptive right to purchase land at private sale. The act did not provide in terms nor by implication for any means of ascertaining the fact of whether the applicant was an actual settler or housekeeper. There was no provision, either directly or indirectly, that this fact should be proved to the satisfaction of the register and receiver, the only provision upon the subject being a requirement that an affidavit should be filed at the time an application was made to purchase. Hence it is clear that this act did not constitute the register and receiver a special tribunal to determine this question of fact as the pre-emption law of 1830 and that of 1841 does in relation to the fact
29 of the residence and improvement therein provided for. Under this law of 1832 the duties of the register and receiver were simply ministerial and not judicial in any sense, and of course we concede that the ministerial acts of the register and receiver are subject to the direction of their superior officers, and the general supervisory power of the Commissioner of the General Land Office would be sufficient to authorize him to cancel such a sale or claimed entry as that which was before the court in the case of Harkness *vs.* Underhill. The question was really a question of the qualification of the party to make the purchase of the land in question.

The distinction which we here point out can only be made apparent by reference to the law of April 5, 1832, and a comparison of that act with the general pre-emption acts, and especially with the act of 1841, which is still in force.

VII.

While the language of the court in these two cases could not be adopted to its full extent in the opinion of the court in the case at bar, yet when read in the light of the facts we are confident that it does not in the least degree militate against the position which we assert in this case.

The language used by us in our original brief in stating the proposition for which we contend was not so fortunately selected as it

might have been, and after more careful study and deliberation we wish to state that the proposition which we contend for in this case is simply this—that the decision of the register and receiver
30 that a pre-emption claimant has fully complied with the law in the matter of residence and cultivation, when made in a case of which these officers have jurisdiction in accordance with the rules prescribed by the Commissioner of the General Land Office, made at the time previously appointed and designated as the date of making final proof and after the previous notice required by the statute in regard to the witnesses, that would be examined and in other respects made in accordance with law is final and conclusive and at least is entitled to more weight than a subsequent finding of the same officers made merely at the suggestion of the Commissioner of the General Land Office and without any authority of law other than the mere dictum of the executive officers of the Government.

VIII.

We wish the court to carefully note that there is one thing at least which distinguishes the case at bar from any case which has been cited in favor of the defendant in error, and that is the fact that in the case at bar it is admitted on the record that at the time of the entry in question the land in question was unoccupied and unappropriated lands of the United States, there being no claim made to it at that time by any person whomsoever, either under the pre-emption law or any other law, or any adverse grant or claim of any character whatsoever. From this fact it follows that when the register and receiver in the first instance determined the question that —— —— had complied with the law in the matter of resi-
31 dence and cultivation the jurisdiction of these officers to determine this question was full and complete. It also appears that in all respects it was a case in which the duty devolved upon them to decide these facts judicially. This, we claim, is entirely sufficient to distinguish the case at bar from the cases of Branard's Heirs *vs.* Ashley's Heirs and Harkness *vs.* Underhill, *supra.*

IX.

We confidently assert that the cases of Wilcox *vs.* Jackson and Lytle *vs.* The State have never been overruled or questioned in so far as they assert the doctrine that the determination of the question of residence and cultivation is submitted by section 2263 of the Revised Statutes to the register and receiver as a special tribunal to determine, which section seems unquestionably to bear that meaning upon its face.

This section has been in force ever since 1841 and is substantially the same as a similar section in the act of 1830; but it is claimed that the act of 1836, which is also still in force, modified the provisions of the act of 1830. It seems to us that with equal force of logical reasoning we might contend that the act of 1841, being subsequent to that of 1836, modifies that act and gives to registers and receivers all the power and authority which they had under the

law of 1830 and again makes their decisions final, as they were *had* to be under the act of 1830. This, it would seem, would be the rule if it were found that the act of 1836 is really in conflict with the provisions relating to the register and receiver already
32 referred to; but our opinion is, and it seems to us we can satisfy the court, that the general provisions enacted in 1836, providing that "from and after the passage of this act the duties now prescribed or which may hereafter be prescribed by law appertaining to the surveying and sale of the public lands of the United States or in anywise respecting such lands, etc., shall be subject to the supervision and control of the Commissioner of the General Land Office, under the direction of the President of the United States," does not conflict with nor in any — modify the power of the register and receiver nor in any — affect the conclusiveness or finality of their determination of the question which they did determine in the case at bar.

It is true that the court in its *obiter dicta* opinion in the case of Barnard's Heirs *vs.* Ashley's Heirs says that "the act of 1836 modifies the powers of the register and receivers to the extent of the Commissioner's action in the instances before us;" but in order to understand this language it is necessary to know what "instances" were before the court in that case and to determine whether the "instances" before that court were the same that are now before this court in the case at bar, and this is the very point which seems to us to be decisive of the matter.

The instances before the court in the case of Barnard's Heirs *vs.* Ashley's Heirs did not in any way involve the question of whether the decision of the register and receiver determining that a
33 pre-emptor's residence and improvement complied with the law was final or conclusive or could be overturned by so-called subsequent proceedings situated without authority of law and upon new testimony. Nut, if the *obiter dicta* of the courts in the cases referred to are to be given any weight at all, they are not entitled to any more weight than the language which we have quoted from other decisions, which language the court also finds to be *obiter dicta*.

X.

In the cases of Cornelius *vs.* Kessell, Johnson *vs.* Tromsloy, and in some of the other cases which we have cited, will be found language which certainly tends as much to support our contention as the language above referred to militates against it; but we are left to grope about in the uncertainty of *obiter dicta*. We have the cases of Elliott *vs.* Piersol, Wilcox *vs.* Jackson, and Lytle *vs.* The State of Arkansas, in which the very question involved is decided, and these decisions, it will hardly be claimed, have ever been overruled. Then we have the case of Lindsley *vs.* Hawes, 2nd Black, 554, which distinctly decides that the cancellation of the pre-emption certificate in that case was an illegal and void act; and, although the ground upon which the certificate was cancelled was not the same as the ground of cancellation in the case at bar, yet it is de-

cided at least that when the question is presented to the court the court must determine whether the alleged ground of cancellation is a legal and valid ground or whether it is not.

34 In the case at bar the ground of cancellation was that at an unauthorized hearing, upon new testimony taken without authority of law, the officers of the Government arrived at a different conclusion as to the facts of residence and cultivation from that which the register and receiver had formerly arrived at upon a hearing which was specially authorized by statute.

XI.

We believe it was conceded by counsel for defendant in error on the argument of this cause, and it certainly seems to be conceded in all cases argued and determined in the State courts as well as in the inferior Federal courts, that the precise question presented by the case at bar has never been determined by the Supreme Court of the United States since the time of passage of the act of 1836, above referred to. But there is no case which was cited in our reply brief, though we fear the citation was so obscure that it has been overlooked, and hence we wish to call special attention to it. We refer now to the case of The United States *vs.* Butterworth, 112 U. S., 50, and, while the questions in this case arise out of the administration of another branch of the Interior Department of the Government, we cannot see any reason why the principle involved and decided is not substantially the same as that in the case at bar. One branch of the syllabus, to which we call special attention, is in the following language:

35 "The executive supervision and direction which the head of a department may exercise over his subordinates in matters administrative and executive do — extend to matters in which the subordinate is directed by statute to act judicially."

If this is a correct principle, is it not decisive of the case at bar in our favor? Has it not been established by an overwhelming authority that the register and receiver are directed by statute to act judicially in deciding the question of residence and improvement upon final proof of a pre-emption claim? We certainly think this question will be answered in the affirmative, and the only contention in opposition to our claim has been that, by virtue of the law of 1836, the Commissioner of the General Land Office was given supervision and control of all executive duties theretofore prescribed or that might thereafter be prescribed respecting sales of lands, etc. Can it be claimed that this duty of the register and receiver to hear and determine the questions of residence and improvement is merely executive duty? We certainly think it cannot; but if it is a judicial duty, then it is not subject to any control or supervision of the Commissioner of the General Land Office except, of course, in so far as the mode of procedure may be regulated by rules prescribed.

In this case of United States *vs.* Butterworth the court, in the course of its opinion, says: "And, in respect to the particular illus-

tration drawn from the relation of the General Land Office
36 to the Department of the Interior, the language of the section of the Revised Statutes describes the duties of the Commissioner to be performed under the direction of the Secretary as executive duties, while those with relation to the decision of questions of private right under the pre-emption laws, being quasi-judicial, are made by section 2273 expressly subject to an appeal, 1st, from the register and receiver to the Commissioner and from him to the Secretary."

We think it is plain that the argument of the learned judge, if written out *in extenso*, would read substantially as follows: That whereas the duties of the Commissioner are described in the statute as executive duties and the only control and supervision conferred upon the Commissioner are those in relation to executive duties, and whereas the same statutes have committed certain questions of private right under the pre-emption laws to the register and receiver to be decided judicially, therefore the Commissioner cannot, under the authority conferred upon him, exercise any supervision over the discharge of these judicial duties by the inferior officers of the department; and, again, whereas the statutes have pointed out and designated the instances in which an appeal may be taken from the judicial decision of the register and receiver, the usual rule of statutory -struction is to be applied, viz., *expressio unius est exclusio alterius*, and consequently the Commissioner cannot exercise even appellate jurisdiction over the decision of the inferior officers in any instances except those designated by the statute; and,
37 again, from the fact that appellate jurisdiction is especially conferred upon the Commissioner in the instances referred to, the conclusion should be drawn that the Commissioner, in the absence of such statutory authority, would have no appellate jurisdiction whatever; and, further, that he has no supervisory jurisdiction, because otherwise it would be necessary to confer appellate jurisdiction upon him, for the reason that the supervisory jurisdiction claimed by the defendant in error in this case would be much more efficient, speedy, and untrammelled in any of the instances in which appellate jurisdiction is given than the appellate jurisdiction itself.

We do not see how any one can read this case of United States *vs.* Butterworth without coming to the conclusion that the learned judge would have decided the case at bar in accordance with our contention.

XII.

In conclusion, we would say we are confident upon a rehearing the court would be convinced that the case of Barnard's Heirs *vs.* Ashley's Heirs and Harkness *vs.* Underhill are not at all decisive of the case at bar, and our duty to our client as well as our regard for what we conceive to be a very important principle, involving questions of superlative importance to the citizens of this new State, have impelled us to pray the court to grant such a rehearing.

Respectfully submitted.

DOOLITTLE, PRITCHARD & STEVENS,
Att'ys for Pl'ff in Error.

38 STATE OF WASHINGTON, } ss:
County of Pierce, }

I hereby acknowledge due and legal service of the within petition for rehearing at Tacoma, county of Pierce, Washington, this 12th day of March, A. D. 1891.

JUDSON, SHARPSTEIN & SULLIVAN,
Attorneys for Def'ts in Error.

Filed March 12, 1891.

C. S. REINHART, *Clerk.*

39 In the Supreme Court, State of Washington.

GEORGE F. ORCHARD, Pl't'ff in Error, }
vs.
WILLIAM ALEXANDER, Def't in Error. }

The petition for rehearing in the above-entitled action is hereby denied.

Entered, pg. 325, vol. 1, Record.
April 7, 1891.

40 In the Supreme Court, Holding Session at Olympia, January Session, 1891.

GEORGE F. ORCHARD }
vs. } No. 65.
WILLIAM ALEXANDER. }

Cost Bill.

	Dollars.	Cents.
Clerk's fees	8	55
Sheriff's fees		
Attorney fees	15	00
Binding transcript		
District court fees		
Printing brief	108	00
Miscellaneous fees		
Total	$131	55

STATE OF WASHINGTON, } ss:
County of Pierce, }

John P. Judson, being first duly sworn, says that he is of counsel for the appellee in the above-entitled cause, and that the foregoing is a true exhibit of the costs and disbursements necessarily incurred and expended in said cause and court, and that the same is true as he verily believes.

JOHN P. JUDSON.

Subscribed and sworn to before me this eighteenth day of February, 1891.

W. C. SHARPSTEIN,
Notary Public.

Filed Feb. 21, 1891.

SOL. SMITH, *Clerk.*

41 In the Supreme Court of the State of Washington.

GEORGE F. ORCHARD, Plaintiff in Error,
vs.
WILLIAM ALEXANDER, Defendant in Error. } Petition for Writ of Error.

To the Honorable T. J. Anders, chief justice of the supreme court, State of Washington:

Now comes George F. Orchard, plaintiff in error in the above-entitled cause, and represents and alleges that on the 11th day of February, 1891, the supreme court of the State of Washington made and entered a judgment in the above-entitled cause in favor of William Alexander, the defendant in error, and against George F. Orchard plaintiff in error, for the recovery of the sum of $131.55, the costs of said action; and also for the affirmance of the judgment of the superior court of the county of Pierce and State of Washington in said cause, and a petition for rehearing having been duly filed was on April 7th denied, and on said April 7th, 1891, said judgment was finally rendered.

And your petitioner further represents and alleges that said supreme court of the State of Washington is the highest court
42 of said State in which a decision in the said action can be had, and that the said judgment so rendered by said supreme court is a final judgment in said cause.

And your petitioner further represents and alleges that there is manifest error in the record and proceedings in said supreme court of the State of Washington in the following particulars, viz:

First. That by the record aforesaid it appears that the judgment aforesaid was given for the said William Alexander and against the said George F. Orchard, whereas by the law of the land the said judgment ought to have been given for the said George F. Orchard and against the said William Alexander.

Second. That by the record aforesaid it appears that the judgment of the said superior court of the county of Pierce, State of Washington, was affirmed by the supreme court of the State of Washington, whereas by the law of the land the said judgment of the said superior court ought to have been reversed.

Third. That by the record aforesaid it appears that the demurrer of the said William Alexander to the reply of the said George F. Orchard in the said superior court of the county of Pierce and State of Washington was sustained by the said superior court, and its judgment in sustaining said demurrer was affirmed by the supreme court of the State of Washington, whereas by the law of the land

the said demurrer ought to have been overruled and the said judgment of the said superior court ought to have been reversed.

43 Fourth. That by the record aforesaid it appears that the said action brought by George F. Orchard, as plaintiff, against William Alexander, as defendant, in the said superior court of the county of Pierce and State of Washington was dismissed by the said superior court, and that the said judgment dismissing said action was affirmed by the supreme court of the State of Washington, whereas by the law of the land the said judgment of the superior court ought to have been reversed.

Fifth. That by the record aforesaid it appears that your petitioner, George F. Orchard, as plaintiff in said action in the superior court of the county of Pierce and State of Washington, claimed and asserted a right and title to the lands described in his complaint, and claimed to be the owner of said lands and entitled to the possession thereof under and by virtue of chapter four of title XXXII of the Revised Statutes of the United States, and especially under and by virtue of sections twenty-two hundred and fifty-nine and twenty-two hundred and sixty-three and subsequent acts of Congress amendatory of and supplemental to said chapter four of the Revised Statutes of the United States relating to pre-emptions, and the said right and title of your petitioner to the said lands under the laws of the United States as aforesaid was by said supreme court of the State of Washington denied, and the said judgment and *and* decision of the supreme court of the State of Washington was against the right and title of your petitioner to the said lands, whereas by the laws and statutes of the United States as aforesaid your peti-

44 t-on-'s right and title should have been sustained and the decision of the said supreme court of the State of Washington ought to have been in favor of his said right and title.

Sixth. That by the record aforesaid it appears that at a time when the lands described in the complaint of your petitioner filed in the said superior court of Pierce county, State of Washington, were vacant and unappropriated lands belonging to the United States and subject to the right of pre-emption your petitioner was in all respects qualified to enter said lands under the statutes of the United States relating to pre-emption claims, and that he did enter the same in pursuance of all the conditions, restrictions, and stipulations provided by the laws and statutes of the United States and did pay therefor to the United States the minimum price for said lands, and prior to making said entry duly made proof of the settlement and improvement required by section twenty-two hundred and fifty-nine of the Revised Statutes of the United States, to the satisfaction of the register and receiver of the land district in which said lands lie, agreeably to the rules theretofore prescribed by the Secretary of the Interior, whereby your petitioner became the

45 owner of and entitled to the possession of said lands, and yet the decision of the said supreme court of the State of Washington by its judgment aforesaid was against the said right of your petitioner and denied to him his ownership and possession of said lands, to which he was entitled as aforesaid.

All of which errors will more fully appear by an assignment of errors in the Supreme Court of the United States, which is filed herewith.

Wherefore your petitioner prays that a writ of error may be allowed to the said supreme court of the State of Washington, whereby the said final judgment may be removed to the Supreme Court of the United States, to be there reviewed and corrected, and that a citation may be issued to the said William Alexander, citing and admonishing him to be and appear at the Supreme Court of the United States to be holden at the city of Washington, D. C., on or before Thursday, June 25th, A. D. 1891, there to show cause, if any there be, why the said judgment of the supreme court of the State of Washington should not be corrected, and that the amount of the bond may be fixed which it will be necessary for your petitioner to give in order that execution may be stayed upon the said final judgment and that the said appeal may be duly perfected, and that such other process may be allowed as will enable your petitioner to obtain a review of the said final judgment of the supreme court of the State of Washington and a correction of the said alleged errors by the Supreme Court of the United States.

GEORGE F. ORCHARD, *Petitioner*,
By DOOLITTLE, PRITCHARD & STEVENS &
P. S. GROSSCUP, *His Attorneys*.

46 Filed April 27th, 1891.

C. S. REINHART, *Clerk*.

47 In the Supreme Court of the State of Washington.

GEORGE F. ORCHARD, Plaintiff in Error,
vs.
WILLIAM ALEXANDER, Defendant in Error. } Order.

Now, this day, upon the petition of George F. Orchard, as plaintiff in error, for the allowance of a writ of error to the supreme court of the State of Washington in the above-entitled cause, whereby the final judgment and records in said cause may be removed to the Supreme Court of the United States, to be there reviewed and corrected, the undersigned, chief justice of the supreme court of the State of Washington, has found and determined that in the above-entitled action the plaintiff in error, George F. Orchard, has claimed a right and title under a statute of the United States and the decision of the supreme court of the State of Washington was and is against the right and title so claimed under said statute, and that the plaintiff in error is entitled to have said records and proceedings in the above-entitled action and the final judgment of the supreme court of the State of Washington therein reviewed in the Supreme Court of the United States—

48 It is therefore ordered and adjudged that a certificate in the following form be issued by the chief justice, viz:

I, T. J. Anders, chief justice of the supreme court of the State of Washington, do hereby certify that it manifestly appears from the records of that certain case No. 65, heretofore pending in the supreme court of the State of Washington, wherein George F. Orchard is plaintiff in error and William Alexander is defendant in error, that the plaintiff in error claimed a right and title to certain lands and tenements in his complaint described under and by virtue of a statute of the United States, and that the decision of the said supreme court of the State of Washington, which is the highest court of said State in which a decision in the said action could be had, was against the said right and title so claimed by the plaintiff in error, George F. Orchard—that is to say, the plaintiff in error, George F. Orchard, as appears by the records of the above-entitled action, claimed to be the owner and entitled to the possession of certain lands and tenements in his complaint described, under and by virtue of chapter four of title XXXII of the Revised Statutes of the United States relating to pre-emptions, and the subsequent acts amendatory of and supplemental to said chapter four, and especially under and by virtue of the provisions of sections twenty-two hundred and fifty-nine and twenty-two hundred and sixty-three of the Revised
49 Statutes of the United States, and that the decision of the supreme court of the State of Washington in the above-entitled cause was against his said claimed right and title and had the effect of denying his ownership and right of possession to the said lands, and I therefore certify that the said plaintiff in error, George F. Orchard, is entitled to have the said action and the final judgment of the supreme court of the State of Washington reviewed by a writ of error in the Supreme Court of the United States, and the foregoing writ of error is accordingly allowed.

Witness the Honorable T. J. Anders, chief justice of the supreme court of the State of Washington, this 27th day of April, in the year of our Lord one thousand eight hundred and ninety-one.

T. J. ANDERS,
Chief Justice of the Supreme Court of the State of Washington.

And it is further ordered that said certificate be spread at large upon the journal of the supreme court of the State of Washington, and that the same be, and is hereby, made a part of the records of said court in the above-entitled cause.

And it is further ordered that a writ of error in the above-entitled action to the supreme court of the State of Washington, whereby the said cause and the final judgment therein may be removed to
50 the Supreme Court of the United States, to be there reviewed and corrected, be, and is hereby, allowed.

And it is further ordered that a citation be issued to the defendant in error in the above-entitled action to be and appear at the Supreme Court of the United States on or before Thursday, the 25th day of June, A. D. 1891, there to show cause, if any, why the judgment in the above-entitled action should not be corrected.

And it is further ordered that the plaintiff in error, George F. Orchard, give bond unto the said William Alexander in the sum of

two thousand five hundred dollars, conditioned to prosecute his writ of error to effect, and if he fail to make his plea good that he shall answer all damages and costs.

And now, it further appearing to the undersigned, chief justice of the supreme court of the State of Washington, that the plaintiff in error, George F. Orchard, by permission of the undersigned justice, has filed his bond with the clerk of this court in the sum of two thousand five hundred dollars, conditioned according to law, for the prosecution of his writ of error herein, and that if he fail to make good his plea that he shall answer all damages and costs:

It is further ordered that said bond and the sureties thereon be, and the same is hereby, approved, and that all further proceedings upon the final judgment heretofore rendered in the above-entitled action be, and they are hereby, stayed during the pendency of said writ of error.

Done at Olympia, Washington, this 27th day of April, A. D. 1891.

T. J. ANDERS,
Chief Justice of the Supreme Court of the State of Washington.

Filed April 27, 1891.

C. S. REINHART, *Clerk.*

Entered, pg. 327, vol. 1, Record.

51 In the Supreme Court of the United States of America.

GEORGE F. ORCHARD, Plaintiff in Error,
vs.
WILLIAM ALEXANDER, Defendant in Error. } Assignment of Errors.

Now comes George F. Orchard, the plaintiff in error, and makes the following assignment of errors in the Supreme Court of the United States in the above-entitled cause, which is hereby removed from the supreme court of the State of Washington to the Supreme Court of the United States by writ of error; and the plaintiff alleges that there is manifest error in the record and proceedings of the said supreme court of the State of Washington in the following particulars, to wit:

First. That by the record aforesaid it appears that the judgment aforesaid was given for the said William Alexander and
52 against the said George F. Orchard, whereas by the law of the land the said judgment ought to have been given for the said George F. Orchard and against the said William Alexander.

Second. That by the record aforesaid it appears that the judgment of the said superior court of the county of Pierce, State of Washington, was affirmed by the supreme court of the State of Washington, whereas by the law of the land the said judgment of the said superior court ought to have been reversed.

Third. That by the record aforesaid it appears that the demurrer of the said William Alexander to the reply of the said George F. Orchard in the said superior court of the county of Pierce and State of

Washington was sustained by the said superior court, and its judgment in sustaining said demurrer was affirmed by the supreme court of the State of Washington, whereas by the law of the land the said demurrer ought to have been overruled and the said judgment of the said superior court ought to have been reversed.

Fourth. That by the record aforesaid it appears that the said action brought by George F. Orchard, as plaintiff, against William Alexander, as defendant, in the said superior court of the county of Pierce and State of Washington was dismissed by the said superior court, and that the said judgment dismissing said action
53 was affirmed by the supreme court of the State of Washington, whereas by the law of the land the said judgment of the superior court ought to have been reversed.

Fifth. That by the record aforesaid it appears that George F. Orchard, as plaintiff in said action in the superior court of the county of Pierce and State of Washington, claimed and asserted a right and title to the lands described in his complaint, and claimed to be the owner of said lands and entitled to the possession thereof under and by virtue of chapter four of title XXXII of the Revised Statutes of the United States, and especially under and by virtue of sections twenty-two hundred and fifty-nine and twenty-two hundred and sixty-three, and subsequent acts of Congress amendatory of and supplemental to said chapter four of the Revised Statutes of the United States relating to pre-emptions, and the said right and title of the plaintiff in error to the said lands under the laws of the United States as aforesaid was by said supreme court of the State of Washington denied, and the said judgment and decision of the supreme court of the State of Washington was against the right and title of the plaintiff in error to the said lands, whereas by the laws and statutes of the United States as aforesaid the plaintiff's right and title should have been sustained and the decision of the said supreme court of the State of Washington ought to have been in favor of his said right and title.

54 Sixth. That by the record aforesaid it appears that at a time when the lands described in the complaint of the plaintiff in error filed in the said superior court of Pierce county, State of Washington, were vacant and unappropriated lands belonging to the United States and subject to the right of pre-emption, the plaintiff in error was in all respects qualified to enter said lands under the statutes of the United States relating to pre-emption claims, and that he did enter the same in pursuance of all the conditions, restrictions, and stipulations provided by the laws and statutes of the United States, and did pay therefor to the United States the minimum price for said lands, and prior to making said entry duly made proof of the settlement and improvement required by section twenty-two hundred and fifty-nine of the Revised Statutes of the United States to the satisfaction of the register and receiver of the land district in which said lands lie, agreeably to the rules theretofore prescribed by the Secretary of the Interior, whereby the plaintiff in error became the owner of and entitled to the possession of said lands, and yet the decision of the said supreme court of

the State of Washington, by its judgment aforesaid, was against the said right of the plaintiff in error and denied to him his ownership and possession of said lands to which he was entitled as aforesaid.

55 Wherefore the plaintiff in error prays the honorable Supreme Court of the United States that the judgment of the said supreme court of the State of Washington in the above-entitled cause may be reversed and held for naught, and that the plaintiff in error may be restored to all things that he has lost by reason thereof.

DOOLITTLE, PRITCHARD & STEVENS &
P. S. GROSSCUP,
Attorneys for Plaintiff in Error.

55½ [Endorsed:] No. 65. In the Supreme Court of the United States. George F. Orchard, plaintiff, *vs.* William Alexander, defendant. Assignment of errors. Received copy of within this — day of ——, 189–. —— ——, attorneys for —— ——. Filed April 27, 1891. C. S. Reinhart, clerk. Doolittle, Pritchard, Stevens & Grosscup, Fidelity Trust Co.'s building, Tacoma, Wash., attorneys for plaintiff.

56 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Washington, Greeting:

Because in the record and proceeding- and also in the rendition of the judgment of a plea which is in the said supreme court of the State of Washington, being the highest court of the said State in which a decision could be had in the said suit, before you, between George F. Orchard, plaintiff in error, and William Alexander, defendant in error, said judgment having been entered Feb. 11, 1891, and finally rendered on Apr. 7, 1891, when petition for rehearing was denied, wherein a right and title was claimed under a statute of the United States and the decision was against said right and title specially set up and claimed under said statute, a manifest error hath happened, to the great damage of the said George F. Orchard, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on Thursday, June 25th, 1891, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 27th day of April, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and fifteenth.

Seal United States Circuit Court, District of Washington.

A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the District of Washington.

The above writ of error is hereby allowed.

T. J. ANDERS,
Chief Justice of the Supreme Court of the State of Washington.

57 I, T. J. Anders, chief justice of the supreme court of the State of Washington, do hereby certify that it manifestly appears from the records of that certain case No. 65, heretofore pending in the supreme court of the State of Washington, wherein George F. Orchard is plaintiff in error and William Alexander is defendant in error, that the plaintiff in error claimed a right and title to certain lands and tenements in his complaint described under and by virtue of a statute of the United States, and that the decision of the said supreme court of the State of Washington, which is the highest court of said State in which a decision in the said action could be had, was against the said right and title so claimed by the plaintiff in error, George F. Orchard—that is to say, the plaintiff in error, George F. Orchard, as appears by the records of the above-entitled action, claimed to be the owner and entitled to the possession of certain lands and tenements in his complaint described under and by virtue of chapter four of title XXXII of the Revised Statutes of the United States, relating to pre-emptions, and the subsequent act amendatory of and supplemental to said chapter four, and especially under and by virtue of the provisions of sections twenty-two hundred and fifty-nine and twenty-two hundred and sixty-three of the Revised Statutes of the United States, and that the decision of the supreme court of the State of Washington in the above-entitled cause was against his said claimed right and title and had the effect of denying his ownership and right of possession to the said lands; and I therefore certify that the said plaintiff in error, George F. Orchard is entitled to have the said action and the final judgment of the supreme court of the State of Washington reviewed by a writ of error in the Supreme Court of the United States, and the foregoing writ of error is accordingly allowed.

Witness the Honorable T. J. Anders, chief justice of the supreme court of the State of Washington, this 27th day of April, in the year of our Lord one thousand eight hundred and ninety-one.

T. J. ANDERS,
Chief Justice of the Supreme Court of the State of Washington.

57½ [Endorsed:] No. 65. In the Supreme Court of the United States. George F. Orchard, plaintiff, *vs.* Wm. Alexander, defendant. Writ of error. We have received copy and acknowledge service of within this 29th day of April, 1891. Judson & Sharpstein, attorneys for defendant. Filed April 27, 1891. C. S. Reinhart, clerk. Doolittle, Pritchard, Stevens & Grosscup, Fidelity Trust Co.'s building, Tacoma, Wash., attorneys for pl'ff.

58 UNITED STATES OF AMERICA, *ss:*

To Wm. Alexander, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, D. C., on or before Thursday, June 25th, A. D. 1891, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Washington, wherein George F. Orchard is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable T. J. Anders, chief justice of the supreme court of the State of Washington, this 27th day of April, in the year of our Lord one thousand eight hundred and ninety-one.

T. J. ANDERS,
Chief Justice of the Supreme Court of the State of Washington.

I hereby acknowledge due service upon me of the foregoing citation by delivering to me a true copy thereof in the city of Tacoma, county of Pierce and State of Washington, on this — day of ——, A. D. 1891.

—— ——,
By —— ——,
His Attorneys of Record.

[Written across the face:] See back of cover for service.

58½ [Endorsed:] No. 65. In the supreme court of the State of Washington. George F. Orchard, plaintiff, *vs.* Wm. Alexander, defendant. Citation. We have received copy and acknowledge service of within this 29th day of April, 1891. Judson & Sharpstein, attorneys for defendant. Filed April 27, 1891. C. S. Reinhart, clerk. Doolittle, Pritchard, Stevens & Grosscup, Fidelity Trust Co.'s building, Tacoma, Wash., attorneys for pl'ff.

59 In the Supreme Court of the State of Washington.

GEORGE F. ORCHARD, Plaintiff in Error,
vs.
WILLIAM ALEXANDER, Defendant in Error. } Bond.

Know all men by these presents that George F. Orchard and W. H. Opie and Eben Pierce are held and firmly bound unto William

Alexander, of the county of Pierce and State of Washington, in the sum of two thousand five hundred dollars, to be paid to the said William Alexander, his executors or administrators; for the payment of which, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 27th day of April, A. D. 1891.

Whereas the above-named George F. Orchard hath sued out a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Washington and desires a stay of proceedings on said judgment:

60 Now, therefore, the condition of this obligation is such that if the above-named George F. Orchard shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

G. F. ORCHARD. [SEAL.]
W. H. OPIE. [SEAL.]
EBEN PIERCE. [SEAL.]

STATE OF WASHINGTON, } ss:
Pierce County, }

W. H. Opie and Eben Pierce, being first duly sworn, each for himself says that he is over the age of twenty-one years, a citizen of the United States, and a freeholder of Pierce county; that he is not an attorney-at-law nor an officer of any court; that he is worth the amount specified in the foregoing bond over and above all just debts and liabilities and property exempt from execution.

W. H. OPIE.
[SEAL.] EBEN PIERCE.

Subscribed and sworn to before me this 27th day of April, A. D. 1891.

W. H. DOOLITTLE,
Notary Public in and for the State of Washington, Residing at Tacoma, Pierce Co.

We have received copy and acknowledge service of within this 29th day of April, 1891.

JUDSON AND SHARPSTEIN,
Attorneys for Defendant.

The within bond is approved this 27th day of April, A. D. 1891.

T. J. ANDERS,
Chief Justice of the Supreme Court of the State of Washington.

61 STATE OF WASHINGTON, } ss:
County of Thurston, }

I, C. S. Reinhart, clerk of the supreme court of the State of Washington, do hereby certify that the foregoing is a full, complete,

and correct transcript of the record of and journal entries in the cause wherein George F. Orchard is plaintiff in error and William Alexander is defendant in error, together with the original citation and assignment of errors and writ of error on appeal to the United States Supreme Court.

In testimony whereof I hereunto set my hand and affixed the seal of said court, at Olympia, this — day of May, A. D. 1891.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,
Clerk of the Supreme Court of the State of Washington.

Endorsed on cover: Case No. 14,677. Washington supreme court. No. 192. George F. Orchard, plaintiff in error, *vs.* William Alexander. Filed June 9, 1891.